

was made on March 24, 1958 the twelve year period would end in 1970 and since this application commenced in 1981 the Plaintiff's action is thus statute-barred under section 9 of the Limitation Act 1953.

Counsel referred to certain paragraphs in *Megarry's, The Law of Real Property* at p. 607 where it is said that the covenants are subject to the usual period of limitation (twelve years). Under the footnote, this provision refers to the English Limitation Act 1939, section 2(3). I have taken time to consider this point, but unfortunately there is no similar provision in our Limitation Act 1953. Nowhere is it mentioned in our Act of an action upon speciality as submitted by counsel. The relevant section of our Limitation Act is section 9(1) which is limitation of actions to recover land and "land" under section 2 includes "things attached to the earth or permanently fastened to anything attached to the earth, rent charges and any legal or equitable estate or interest in land including an interest in the proceeds of sale of land held upon trust for sale but save as aforesaid does not include any right of way, easement, servitude, profit over or in respect of land, or right in the nature of an easement, servitude or profit over or in respect of land, or any other incorporeal hereditament.". Again, section 2(4) says that references in the Act to a right of action to recover land shall include references to a right to enter possession of the land.

After considering the matter, I am of the opinion that the dispute here is not as to the title or ownership of Lot 919 as to attract section 9 of the Limitation Act 1953. In such circumstances, the issue of limitation does not arise.

Having disposed of the issues in this application, there is of course one final point which this Court has to consider before exercising its discretion to grant the Plaintiff's application. It was contended by the counsel for the defendant in his written submission dated April 11, 1984 under 'delay and laches' that the Plaintiff became the registered owner of Lot 920 on October 6, 1978. He filed the action on August 6, 1981. Then, without any written intimation to the Defendant, the Plaintiff made an application to Majlis Perbandaran, Seberang Perai to subdivide the said Lot by including Lot 919, the Defendant's property. I take it that the intention of counsel here is to show to this Court that the Plaintiff was guilty of laches and delay which would

A warrant me not to exercise my discretion in favour of the Plaintiff. Having considered the two affidavits of Goh Kim Choon, the Chairman of the Plaintiff's Company, showing the circumstances which made the Plaintiff file this application on August 6, 1981, I am satisfied that the conduct of the Plaintiff up to the date of filing this application does not amount to being guilty of laches or undue delay.

For the above reasons I allow the Plaintiff's application by ordering that the Defendant do surrender Lot No. 1036 (formerly Lot 919) Section 4, Bandar Butterworth to the Government of Penang and the Registrar of Land Titles, Penang do register and give effect to this Order. The costs of this application to the Plaintiff.

D *Application allowed.*

Solicitors: R. Rajasingam; Presgrave & Matthews.

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F
ONG LEAN SIM & ANOR. v. TIO KAH HIN & ORS.

[O.C.J. (Mohamed Dzaiddin J.) July 23, 1984 & September 3, 1984]

[Penang – Civil Suit No. 668 of 1982]

G *Practice and Procedure – Defence – Action to strike out – Defence filed disclosed no reasonable defence – Defence frivolous or vexatious or tends to delay fair trial of action – R.H.C. 1980, O. 18 r. 19(1).*

Landlord & Tenant – Lease for 10 years – Claim for delivery of vacant possession, mesne profit and costs – Set-off and counterclaim – Delay in applying to strike out defence and counterclaim – Delay has not caused any injustice to either side.

H By a lease registered under the National Land Code the plaintiffs granted to the first and second defendants a lease of premises No. 97, Burmah Road, Penang for ten years from January 11, 1971 to January 10, 1981. After expiry of the lease, the first and second defendants continued to remain on the premises on a monthly tenancy. On July 12, 1982 the plaintiffs through their solicitors gave written notice to quit and to deliver vacant possession on August 31, 1982. The plaintiffs now claim for delivery of vacant possession, mesne profit and costs. As against the third defendant, the plaintiffs alleged that he was a trespasser on a portion of the said premises.

I In defence, the first and second defendants claimed that after the expiry of the ten-year lease, they continued

to be yearly tenants of the plaintiffs paying rental of \$24,000.00 per annum payable monthly at \$2,000.00 which was duly received by the plaintiffs. They further alleged that the plaintiffs have retained the deposit which they paid under the original lease and they had also continued to pay the assessment for the said premises. The defendants also contended that the notice of termination was bad in law as the plaintiffs have been accepting the arrears of rent.

The defendants filed a set-off and counterclaim claiming that they had paid the assessment for the premises under a mistake of fact. They claimed a refund or set-off in the sum of \$9,376.38 being the assessment paid by them on behalf of the plaintiffs for the period of 1977 to 1982.

The plaintiffs denied all the allegations of the defendants in their Reply and Defence of the Counterclaim and maintained that the defendants were monthly tenants. The retention of the deposit and payment of assessments were part of the terms upon which the first and second defendants were permitted to remain in the premises as a monthly tenant after the expiration of the lease. As to the Defence to the Counterclaim, they maintained that the averment of payment of assessment under a mistake of fact was bad, frivolous and vexatious.

Counsel for the defendant brought up a preliminary objection on the ground that the plaintiffs had delayed in setting down the action for trial. There was a delay of nearly a year before the plaintiffs took action to apply to strike out the defence and the counterclaim.

Held: (1) the delay of nearly a year before the plaintiffs applied to strike out the defence and counterclaim was not fatal as the application may be made even after the close of pleadings;

(2) the presumption that a person in possession and paying rent on a yearly basis has a tenancy from year to year may be rebutted, for example, by proving from the circumstances and the parties conduct and intention that the occupier should only be a monthly tenant. In this case, the first and second defendants became monthly tenants of the plaintiffs after the expiry of the lease;

(3) the notice to quit given by the plaintiffs was valid and effective;

(4) the issues raised on the counterclaim were without merit and unjustified. The third defendant was a trespasser on the plaintiffs' premises.

Case referred to:

Tucker v. Collinson 34 W.R. 354.

CIVIL SUIT.

Miss Ong Swee See for the plaintiffs/applicants.
Yeap Ghim Guan for the defendants/respondents.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: In this application, the Applicants who are Plaintiffs in the substantive proceeding have asked this Court to strike out the defence under Order 18, rule 19(1) and enter final judgment against the Defendants. The grounds of the application are that the Defence filed by the Defendants discloses no reasonable defence and that such defence is frivolous or vexatious or tends to delay the fair trial of the action.

Briefly, the Plaintiffs' claim is as follows. By a lease registered under the National Land Code the Plaintiffs granted to the First and Second Defendants a lease of premises No. 97, Burmah Road, Penang for ten (10) years from January 11, 1971 to January 10, 1981. After the expiry of the lease, the First and Second Defendants continued to remain on the premises on a monthly tenancy which continued for over a year until July 12, 1982 when the Plaintiffs through their solicitors gave written notice to quit and to deliver vacant possession on August 31, 1982. The Plaintiffs now claim for delivery of vacant possession, mesne profit and costs. As against the Third Defendant, the Plaintiffs allege that he was a trespasser on a portion of the said premises.

The defence of the First and Second Defendants is that soon after the expiry of the ten-year lease, they continued to be yearly tenants of the Plaintiffs paying rental of twenty-four thousand dollars (\$24,000) per annum payable monthly at two thousand dollars (\$2,000) which were duly received by the Plaintiffs. In addition, they allege that the Plaintiffs have retained the deposit which they paid under the original lease and they had also continued to pay the assessment for the said premises. Further, the Defendants contend that the notice of termination is bad in law as the Plaintiffs have been accepting the arrears of rent. The Defendants have also filed a Set-off and Counterclaim claiming that they had paid the assessment for the premises under a mistake of fact. They have asked for a refund or set-off in the sum of nine thousand three hundred and seventy-six dollars and thirty-eight cents (\$9,376.38) being the assessment paid by them on behalf of the Plaintiffs for the period of 1977 to 1982.

In their Reply and Defence to the Counterclaim, the Plaintiffs deny all the allegations of the Defendants and maintain that the Defendants were monthly tenants. The retention of the deposit and payment of assessment were part of the

terms upon which the First and Second Defendants were permitted to remain in the premises as monthly tenants after the expiration of the lease. As to the Defence to the Counterclaim, they maintain that the averment of payment of the assessment under a mistake of fact is bad, frivolous and vexatious.

The grounds in support of the Plaintiffs' claim to strike out the defence are set out in the affidavit of the First Plaintiff affirmed on March 28, 1984 (Enclosure 11).

Before considering the merits of this application, let me dispose of a point taken up by Mr. Yeap in his submission on a preliminary objection. He drew my attention to the delay on the part of the Plaintiffs to make this application, which he said, citing the *1979 White Book*, page 311: "... should always be made promptly and as a rule before the close of pleading." In the present case, the Writ of Summons was filed on December 27, 1982 and the Defence to the Counterclaim on February 7, 1983. The Application to strike out the defence was filed on April 20, 1984 although between the close of the pleadings *i.e.* 14 days after February 7, 1983 and April 20, 1984, the Plaintiffs had done nothing to set down the action for trial. Clearly there was a delay of nearly a year before the Plaintiffs finally decided to apply to strike out the defence and counterclaim.

However, in my opinion, such a delay on the part of the Plaintiffs would not have caused any injustice to either side except that had the substantive action been set down for hearing after the close of pleadings, the matter could have been litigated and disposed of much earlier. In the circumstances, the delay is not fatal as "the application may be made even after the pleadings are closed" per Brett, M.R. in *Tucker v. Collinson*.

It is settled law that it is only in plain and obvious cases that recourse should be had to summary procedure under this rule and the powers conferred by this rule will only be exercised where the case is clear beyond doubt. Having considered the facts as pleaded in the pleadings and the affidavit of the First Plaintiff, I find that there is no dispute as to the facts of the case. What remains to be determined is simply a pure question of law which is, whether after the expiry of the lease, the First and Second Defendants continued to be yearly or monthly tenants of the Plaintiffs.

- A Miss Ong, counsel for the plaintiffs, in both her written and oral submission argued that from the surrounding circumstances the holding over of the tenancy by the First and Second Defendants after the lease had expired resulted in only a periodic monthly tenancy. Therefore the notice to quit which the Plaintiffs had served on the First and Second Defendants dated July 12, 1982 requiring the Defendants to deliver vacant possession of the premises on or before August 31, 1982 was valid and effective. In *Woodfall* on "Landlord and Tenants" 27th edition, volume 1, page 281 it is stated that: "If a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but a tenant strictly at will, until some other interest is granted to him or is to be inferred from the payment of rent." "A tenancy at will is implied where a person is in possession by the consent of the owner, and his possession is not as servant or agent or as a licensee holding under an irrevocable licence, and is not held in virtue of any freehold estate or of any tenancy for a certain term." (Halsbury's Laws of England, 4th edition, volume 27, paragraph 168).

- F From the correspondence exhibited in the affidavit of the First Plaintiff, it is not disputed there was an initial request by the First and Second Defendants for an extension of the lease for a further period of five years at a rental of one thousand eight hundred dollars (\$1,800) per month. This was rejected by the Plaintiffs. However, the Plaintiffs made an offer on January 22, 1981 to allow the First and Second Defendants a fresh tenancy for one year from January 11, 1981 at a rental of two thousand two hundred dollars (\$2,200) per month, but this offer was rejected by the First and Second Defendants who subsequently counter-offered to accept the new tenancy at the rental of two thousand dollars (\$2,000) per month. The Plaintiffs continued to accept this amount monthly on a "without prejudice" basis.

- I A tenancy from year to year may arise either by express agreement (which is not so in the present case) or by presumption of law, "where a person who has entered upon premises pays rent with reference to a yearly holding, provided there are no circumstances to rebut the presumption." "Similarly a tenant who remains in possession of premises in such circumstances as to be in the first instance tenant at will, or tenant at sufferance,

and who subsequently pays rent with reference to a yearly holding becomes tenant from year to year provided that there are no circumstances to rebut the presumption." (*Halsbury's Law of England*, 4th edition, volume 27, paragraph 178).

The presumption that a person in possession and paying rent on a yearly basis has a tenancy from year to year may be rebutted, for example, by proving from the circumstances and the parties' conduct an intention that the occupier should only be a monthly tenant. "The decisive question is with what intent the rent was received and what was the real intention of both parties." (*Halsbury's Laws of England, supra*).

Having considered the facts and the surrounding circumstances deposed in the affidavit of the First Plaintiff, there is an irresistible inference that the First and Second Defendants became monthly tenants of the Plaintiffs after the expiry of the lease. I am also satisfied the notice to quit given by the Plaintiffs was valid and effective.

On the counterclaim, I find that the issues raised are without merit and unjustified. In the case of the Third Defendant, I am satisfied that he has been and remained a trespasser on the Plaintiffs' premises.

Based on the relevant materials before me, I am satisfied, bearing in mind the scope of Order 18, rule 19(1) that this application is, on the undisputed facts and simple question of law, a fit and proper case for me to exercise my discretion by summarily striking out the First, Second and Third Defendants' Defence and the Counterclaim of the First and Second Defendants and entering final Judgment against the three Defendants as prayed in the Statement of Claim and costs.

*Application allowed;
Defence and Counterclaim struck out.*

Solicitors: *Goh Eng Kee & Co.; Yeap & Co.*

SAVINDER KAUR v. THARMA SINGH

[O.C.J. (Shankar J.) December 8, 1984]
[Johore Bahru – Divorce Petition No. 50 of 1981]

Family Law – Divorce – Behaviour of respondent – Petitioner cannot reasonably be expected to live with him – Custody of children – Law Reform (Marriage and Divorce) Act, 1976, ss. 23, 54(b) & 109(2).

In this case the petitioner had commenced proceedings on August 6, 1981 under the Divorce Ordinance, 1952. On the coming into force of the Law Reform (Marriage and Divorce) Act, the petition was presented for disposal under section 54(b) of the Act. To substantiate the breakdown of the marriage it was alleged that the respondent had behaved in such a way that the petitioner could not reasonably be expected to live with him. The petitioner alleged acts of cruelty consisting of drunken bouts in the course of which the respondent would indulge in vulgar abuse of the petitioner and her children and occasionally of minor acts of assault upon the petitioner. The respondent had lost his job and the displacement from his job and his normal domestic environment had created a psychological instability which could account to a large extent for his anti-social behaviour.

Held: (1) on the facts of this case the mental state of the petitioner was such that she cannot be expected to live with the respondent and the decree of dissolution must be made;

(2) custody of the children of the marriage was given to the petitioner with a right of access for the respondent;

(3) no order was made as to maintenance, property or costs.

DIVORCE PETITION.

S.S. Gill for the Petitioner.
Respondent in person.

Cur. Adv. Vult.

Shankar J.: This is a petition for dissolution of a marriage and ancillary relief. The proceedings were commenced under the Divorce Ordinance 1952 on August 6, 1981.

On March 1, 1982, the Law Reform (Marriage and Divorce) Act 1976 (the Act) came into force. By section 109 (2) of the Act all proceedings commenced under the Divorce Ordinance 1952 shall, so far as practicable, be continued under the Act and for this purpose, every petition for divorce is to be deemed to be a petition for divorce under the Act and the grounds set out in the petition are to be deemed to be the principal allegations which it will seek to prove as evidence of the breakdown of the marriage but every such petition, unless the Court otherwise orders, is to be stayed pending reference to a